REMARKS/ARGUMENTS

In compliance with 35 U.S.C. § 121, Applicants hereby elect, with traverse, the claims readable on Species 1(A), 2(A), 3(B), 4(B), 5(C), 6(A), and 7(B). Applicants believe claims 1, 2-4, 6, 7, 10-15, 17, 18, 20, 24-26, 28-35, 39, 42-44, 46-52, 54, 55, 58, 60, 62-67, 72-76, 79-82, 84, and 85 are readable on Species 1(A), 2(A), 3(B), 4(B), 5(C), 6(A), and 7(B).

Having complied with 35 U.S.C. § 121, Applicants respectfully assert that the species election requirement is in error because: 1) embodiments restricted to different species are not mutually exclusive (See, MPEP § 806.04(f)); 2) embodiments restricted to different species overlap in scope (See, MPEP § 806.04(f)); 3) the Examiner has not met the burden required by the MPEP to establish that the species are independent or distinct (See, MPEP § 808.01(a)); and 4) the Examiner has not explained why there would a serious burden on the Examiner if restriction is not required. (See, MPEP § 808.01 (a) and § 808.02).

MPEP 806.04(f) states "restriction to a single species may be proper if the species are mutually exclusive." (emphasis added). In the instant application, the species embodiments identified by the Examiner are not necessarily mutually exclusive embodiments. For example, Figure 3 illustrates a medical device that has functionality to perform sleep-state informed diagnostic testing (Species 5A), sleep-state informed therapeutic device testing (Species 5B), and sleep-state informed monitoring (Species 5C). All of the features can be implemented together in one embodiment as is illustrated by Figure 3, therefore these purportedly separate species are not mutually exclusive. As another example, Figure 6 illustrates a process that has the capability of delivering both a cardiac therapy and a respiratory therapy. Either or both of these therapies may be preventative. Therefore, the Examiner has required a species election between species that are not mutually exclusive contrary to MPEP 806.04(f).

Applicants respectfully assert that the species election requirement is in error and should be withdrawn because the Examiner has not identified mutually exclusive species as indicated by MPEP§ 806.04(f).

The species election requirement is erroneous because the claims directed to some species identified by the Examiner overlap in scope in contradiction with MPEP § 806.04(f).

MPEP 806.04(f) states "to require restriction between claims limited to species, the claims must not overlap in scope." (emphasis added). For example, the Examiner has identified Species 4(A) (respiratory therapy), Species 4(B) (cardiac therapy), and Species 4(C) (preventative therapy) as different species subject to the election of species requirement. However, the claims directed to these purported species overlap in scope because preventative therapy may be a respiratory therapy or a cardiac therapy. Therefore, claims 19 and 21 overlap in scope and claims 20 and 21 overlap in scope.

Claims directed to different species identified by the Examiner overlap in scope. For at least these reasons, the species election requirement is in error under MPEP 806.04(f) and must be withdrawn.

The Examiner has not met the burden under MPEP §808.01(a), §808.02 and §803 to provide reasons as to why the species election is required. "A requirement for restriction is permissible if there is a patentable difference between species as claimed." See MPEP § 803 and § 808.02." (MPEP § 808.01(a)) "Examiners must provide reasons and/or examples to support conclusions." (MPEP §803).

The Examiner has not provided reasons or examples to support conclusions that the identified species are patentably distinct. Applicants are directing arguments to the limited issue of the lack of proper grounds supporting the restriction of Applicants' claims for examination purposes. As such, Applicants' characterization of the claimed subject matter as it may pertain to the issue of distinctiveness or lack thereof within the context of restriction practice is not to be construed as an admission that the claimed inventions are obvious over each other within the meaning of 35 U.S.C. § 103.

Applicants respectfully submit that the Examiner has not met the burden required by MPEP §808.01(a), §808.02 and §803 to support the election requirement because the Examiner has not articulated reasons why the species elections are necessary.

In order to establish reasons for insisting upon restriction, the Examiner must explain why there would be a serious burden on the Examiner if restriction is not required. (See, MPEP § 808.01(a) which references MPEP § 808.02). To comply with this requirement, the Examiner must show by appropriate explanation one of the following (A) separate

classification; (B) separate status in the art when they are classifiable together, or (C) a different field of search. (MPEP § 808.02).

The Examiner has not provided any explanation as to why there would be a serious burden if restriction was not required with regard to the Species identified in the Office Action as required by MPEP § 808.01(a) and § 808.02. For at least these reasons, the election of species requirement is in error and must be withdrawn.

In the above-made arguments, Applicants are contesting the propriety of the Examiner's election of species restriction requirement. Applicants, however, are not traversing on the ground that the species identified by the Examiner are not patentably distinct, but rather are asserting that the basis for requiring election between species and subspecies is not supported.

Applicants respectfully remind the Examiner that, upon allowance of a generic claim, Applicants are entitled to consideration of claims to additional species, including those identified by the Examiner, pursuant to 37 CFR 1.141.

CONCLUSION

In view of the above, the Applicants respectfully request reconsideration and withdrawal of the requirement for restriction. If the Examiner would find it helpful to discuss this issue by telephone, the undersigned attorney of record invites the Examiner to contact the attorney of record.

Respectfully submitted,

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